Remembering the Holocaust 2013: Winnipeg Echoes

by David Matas

(*Revised remarks prepared for delivery on International Holocaust Remembrance day, 27 January 2013, at the Shaarey Zedek Synagogue, Winnipeg*)

Events in the past few months have reminded us of the Holocaust. Posters appeared in Winnipeg in September, 2012 under the heading Shitler's list. The poster had a list of names, mostly Jewish, including the name of the Mayor of the City, Sam Katz, who is himself Jewish.

The text of the poster accused the Mayor of funnelling City money into the pockets of the people on the list through untendered contracts and shady land deals. The people on the list were described as "a cabal of cockroaches" who would be "clutching their dirty money and running for cover".

The name Shitler's list is a play on both Schindler and Hitler. Schindler's list was a list of Jews saved from the Holocaust. Hitler's list was the list of Jews killed in the Holocaust.

The combination containing a variation of the word "shit" carried the implication that those on the list were execrable, detritus, valueless, unclean, people who we needed to get rid of for our own health. The reference to Jews as cockroaches was a common metaphor during the years preceding and accompanying the Holocaust.

The poster had a critique of city politics. However, what was striking was not so much the substance of the criticism as the manner in which it was made.

This public listing of Jews was a commonplace of Nazi propaganda, used as continual support for their claims of a world Jewish conspiracy to control the world for their own evil interests. The newspaper *Der Sturmer* of the Nazi propagandist Julius Streicher had a continual stream of lists much like this poster.

In pre-Nazi Germany, the very success of a wide variety of Jewish individuals contributed to the undoing of the Jewish community, reinforcing the claim of antisemites that the world Jewish conspiracy was alive, well and thriving. Having achieved advantage through accomplishment became, for the Jewish community, a disadvantage, a factor which led to their extermination. Jewish accomplishment became a death warrant.

Julius Streicher was convicted by the International Military Nuremberg after World War II, for crimes against humanity. He was sentenced to death and hanged. His crime was incitement to hatred against Jews while the Holocaust was happening, though he knew it was happening. The Nuremberg Tribunal wrote of Streicher:

> "With knowledge of the extermination of the Jews in the Occupied Eastern Territory, this defendant continued to write and publish his propaganda of death ... Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes, as defined by the Charter, and constitutes a crime against humanity ."[1]

Today, after the Holocaust, no one should be able to plead ignorance when replicating Streicher's techniques. Now we know where this sort incitement leads.

The Supreme Court of Canada in 2005, in a case I argued for several interveners including B'nai Brith Canada, addressed directly the reference to people as cockroaches[2]. Leon Mugesera, a Rwandan permanent resident in Canada, lost his permanent residence and was

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[1] Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg, 30th September and 1st October, 1946. London: HMSO, Cmd. 6964, Reprinted 1966, pp. 100 102

[2] *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40

ordered deported because he had committed, when in Rwanda, incitement to genocide against Tutsis. In a speech he gave in November 1992 in Rwanda, he referred throughout to an invading Tutsi army in his language Kinyarwanda as "inyenza" and the Tutsis in the country as accomplices of these "inyenza".

"Inyenza" in Kinyarwanda means cockroaches. Pierre Duquette, the member of the Immigration Appeal Division of the Immigration and Refugee Board who upheld the removal order observed that the reference to cockroaches alluded "to the insects that infiltrate, are everywhere at night and are not seen during the day". The Supreme Court of Canada upheld the finding of Board member Duquette on incitement to genocide and quoted with approval his observations about the significance of the word "inyenza".

The use of the word "cabal" in the Winnipeg poster is also striking. The author does not think that the people on the list are isolated individual cockroaches. They are rather a conspiracy of cockroaches, another form of replication of Nazi antisemitic eliminationist propaganda.

Because prosecution for incitement to hatred requires the consent of the Attorney General, the Winnipeg police turned to the Attorney General for an indication whether such consent might be forthcoming. Michael Mahon for the Attorney General wrote to Staff Sergeant M. Stephens by letter dated October 15, 2012 that no, the office of the Attorney General did not think that the offence had been made out.

Michael Mahon wrote: "The [Criminal] Code hate propaganda provisions are very specific in requiring evidence of advocating or promoting genocide. The material you have provided does not support that requirement." He added: "Should there be new information or complaints leading to future concerns, please feel free to contact our office as necessary."

The letter from the Attorney General was legally incorrect in a glaring and obvious way. The Criminal Code hate propaganda provisions do not require evidence of advocating or promoting genocide. There is an offence in the Code of incitement to genocide which does indeed require evidence of advocating or promoting genocide. However, the offence of incitement to hatred has no such requirement.

Yet, the legal error once made was irreversible. A prosecution could not be launched without the consent of the Attorney General. If the Attorney General refused consent because he was of the view that proof of commission of the offence required evidence that the moon was made of green cheese and there was no such evidence, well that was that. There would be no prosecution.

An act committed with impunity is often repeated. This act was no different. The poster reappeared in November, but in even worse, more explicit form. This time the names were crossed out and underneath were the words "The Final Solution".

The Nazis euphemistically referred to the Holocaust as the final solution to the Jewish problem. There was, of course, no Jewish problem but only a problem of antisemitism, for which the Jewish population bore no responsibility whatsoever. Referring to a Jewish problem was a form of blaming the victims for their victimization. The final solution was the Nazi way of addressing this blame.

B'nai Brith obtained a copy of the letter to the Winnipeg police from the office of the Attorney General in which the office wrote that there was no offence. We wrote a reaction to this letter asking for reconsideration in light of the new poster and the legal error in confusing the offence of incitement to genocide with the offence of incitement to hatred. We have yet to receive a reply to our letter.

Someone has come forward and claimed authorship of the poster, both through an interview with the Canadian Jewish News and through a YouTube posting. Gordon Warren, a defeated candidate for City of Winnipeg council in 2010, asserted that he was the publisher of the posters and that in publishing them he had no antisemitic intent.

Criminal offences require intent, a guilty mind, *mens rea*. Normally all that requirement means is that the person intends the act, not necessarily the consequences. Moreover, intent is different from motive. Once the act was intended, the motive behind the act is irrelevant. In this context, intent would normally mean that the person intended to publish the antisemitic words whether his motive was antisemitic or whether he intended antisemitic consequences.

However, the offence of incitement to hatred has a double intent requirement. The act must be committed "wilfully" for the offense to be committed. The courts have held that the insertion of the word "wilfully" in to the Criminal Code means that the prosecution must prove not just that the accused intended to publish the words; the accused must also intend to promote hatred[3].

In determining whether a person intends to promote hatred, the final word is not though the word of the accused. The accused may intend one consequence and say he intends another. An accused may be wilfully blind to the consequences of his own words. Wilful blindness meets the intent requirement and can lead to a conviction. A conclusion on the intent of the accused comes from all the evidence, not just the words of the accused.

The question the poster incident raises is not just whether the author of the posters should be prosecuted. The sequence of events raises the larger question of the functionality of our hate speech laws.

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[3] *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369

The Manitoba Defamation Act provides that, where there is publication of a libel against a race, religious creed or sexual orientation likely to expose persons belonging to the group to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people, a person belonging to the group may sue for an injunction to prevent the continuation and circulation of the libel[4]. In theory, I or any Jewish person here could bring the author of the posters to Court under this provision.

Nonetheless, this is a far from a satisfactory solution. It is not just that an individual must complain. The individual must carry the total burden of the legal action. The person who is a member of the vilified group must bear responsibility for the action from start to finish for the remedy to work.

Yet, hate propaganda is not just an attack on the vilified group. It is an attack on the whole community and its values. If we leave responsibility for addressing the wrong to the vilified group, we absolve society from its duty to redress the wrong. We send a false message to members of the vilified group, that the community as a whole does not care about their victimization. We isolate the victims and leave them to their own recourses.

Hate propagandists often operate out of paranoia, fantasizing attacks by the group they vilify. They portray their propaganda as a defense against this fantasized attack. Victims may be reluctant to invoke remedies on their own, because it feeds the paranoia of the propagandist.

As well, any legal action is an expensive and time consuming activity. Where a whole group is vilified, it becomes onerous to expect one member of the group to assume the burden of the litigation alone. Volunteer organizations are chronically underfinanced. It

[4] Article 19

is asking too much to expect organizations to which the victims belong to assume the burden of the litigation.

For a remedy to be effective, it must be state directed. An individual should be able to initiate the remedy with a complaint. He or she should have to do no more.

A state directed remedy is a public comment that the community at large cares about the propaganda, that it rejects the propaganda. A state directed remedy avoids the vagaries of individual direction. It does not require finding someone willing and able to undertake the burden of carrying forward a court proceeding to its conclusion.

What then is one to do when the Attorney General refuses consent as here for reasons which fall prey to legal error? If the courts overturn a refusal of the Attorney General to consent to prosecution and there is a subsequent consent and prosecution, the accused may question of the neutrality of the courts. To avoid that risk, courts have been reluctant to intervene.

In the case of *Chen*, where the police in Edmonton had recommended prosecution for incitement to hatred and the recommendation was detailed, reasoned and publicly available, the Attorney General of Alberta nonetheless refused to consent for the flimsiest of reasons. On behalf of the complainants, I challenged the refusal in the Alberta courts. Mr. Justice Wilson of the Alberta Queen's Bench refused to overturn the decision of the Attorney General, stating that courts would interfere only in case of flagrant impropriety by the Attorney General, which was not the case there[5].

Flagrant impropriety had to "border on corruption by the Crown, violation of the law, bias against the particular offence, or prejudice against the accused or the victim". For there to

[5] *Chen v. Alberta (Attorney General)*, 2007 ABQB 267

be a violation of the law under this standard, the Attorney General must do more than commit legal error; the Attorney General must himself or herself break the law. Moreover, there had to be clear and unmistakeable evidence before a finding flagrant impropriety could be made.

The Court reluctance to interfere is understandable, but it leaves the discretion of the Attorney General to consent subject to irrationality, legal error and arbitrary whim, without recourse. When we are dealing with grave offences, this form of gate keeping is troubling, to say the least.

The discretion of the Attorney General to consent can be exercised in a legally incorrect way, the situation in Winnipeg, without the possibility of judicial review. The hands off approach of the courts requires especial vigilance from the Attorneys General in the exercise of this discretion for the rule of law to prevail. Instead we have a free for all where police may even recommend prosecutions but Attorneys General may refuse consent for the feeblest of reasons.

This defect in the current law, the absence of any meaningful constraints on the consent of the Attorney General, has become particularly worrisome in light of legislation now wending its way through Parliament. A Tribunal established under the Canadian Human Rights Act now has the power to issue an order against an individual within the jurisdiction of the Tribunal to take down hate the individual has posted on the internet. Since the Gordon Warren video has been posted on YouTube from Winnipeg, this law, in theory, could be invoked to request the taking down of the posting.

Yet, the law is now in the process of being abolished. Abolition legislation has passed the House of Commons and is pending in the Senate[6].

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[6] Bill C-304.

The current Human Rights Act provision about hate on the internet has procedural defects which allowed the law to be abused to harass the innocent. So there is some justification for the repeal of the law. However, something is sorely needed to take its place.

One advantage a civil remedy like that now in the Canadian Human Rights Act is that it does not require proof of intent to promote hatred. It is sufficient if promotion of hatred is the result. That is an advantage that the criminal law will not provide because the requirement of intent will and indeed should remain part of the criminal law.

YouTube has a complaints procedure[7] and a community guideline prohibiting the posting of hate. The relevant community guideline states:

> "we don't permit hate speech (speech which attacks or demeans a group based on race or ethnic origin, religion, disability, gender, age, veteran status, and sexual orientation/gender identity)."[8]

I have asked B'nai Brith to invoke the YouTube complaints procedure so that YouTube would take down the video as a violation of their community guidelines. Even if that works, the gap in the law remains. There is an endless number of sites where the Gordon Warren video could be posted. Only the force of the law directed against the person who does the posting can stop the posting entirely.

If all we are left with is an offence of incitement to hatred which Attorneys General like the one in Manitoba refuse to operate because they fail to acknowledge its existence, then the ability of Canada to combat incitement to hatred is undermined. We in B'nai Brith suggest

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[7] http://support.google.com/youtube/bin/request.py?hl=en-US&contact_type=abuse&rd=1

[8] http://www.youtube.com/t/community_guidelines

that the Attorney General of Canada, in consultation with the provinces, settle on guidelines for the exercise of discretion to consent to prosecution for incitement to hatred.

The guidelines would not be legally binding. But at least it would be a step away from the present free for all.

B'nai Brith Canada met with federal Justice Minister Robert Nicholson in April 2012 and asked for federal leadership in developing those guidelines. It is regrettable that nothing has been done since. The Winnipeg posters illustrate dramatically the need for these guidelines.

The Weimar Republic which preceded the Nazi Third Reich in Germany was striking for the non-functionality of its laws against incitement to hatred[9]. Indeed, Julius Goebbels, who later became the Nazi Minister of Propaganda, and Julius Streicher made an early career of abusing those laws to get publicity for their antisemitic cause.

Laws against incitement to hatred are meaningless unless they can be made to work. Their functionality is essential for the survival of a democratic society where different communities can live at peace with each other.

We are here today to remember the Holocaust. Yet, when we see the way in which the concerns about the Winnipeg posters were handled, we seem to have remembered nothing, learned nothing. Surely, when it comes to the Holocaust, we in Winnipeg should be able to do better than that.

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[9] David Matas "The Weimar Republic", Chapter Seven, *Bloody Words: Hate and Free Speech* Bain & Cox, 2000.

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